

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 10186
and
MERCHANT MARINER'S DOCUMENT Z-438 74 1341
Issued to: Herman Ray ASHFORD

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

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Herman Ray ASHFORD

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 24 May 1978, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, after a hearing at Port Arthur, Texas, on 27 April 1978, suspended Appellant's license outright until 20 December 1978 and Appellant's merchant mariner's document outright until 20 September 1978, and further suspended Appellant's merchant mariner's document until 20 December 1978, on probation until 20 December 1978, upon finding him guilty of misconduct. The single specification of the charge of misconduct found proved alleges that Appellant, while serving as operator aboard M/V GULF WATER III, under authority of the captioned documents, did, on 13 April 1978, wrongfully operate the motor vessel GULF WATER III, an uninspected towing vessel, while the captioned license was deposited in compliance with an order of suspension.

At the hearing, Appellant represented himself. Appellant entered a plea of guilty to the charge and specification.

The Investigating Officer introduced into evidence six documents.

In mitigation of his plea of guilty, Appellant made an unsworn statement.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specification as alleged had been proved by plea. He then entered the order described above.

An oral decision was rendered at the conclusion of the hearing and the written decision was served on 5 June 1978. Appeal was timely filed on 26 May 1978.

FINDINGS OF FACT

In an earlier proceeding on 20 March 1978, an administrative law judge of the United States Coast Guard at Houston, Texas, had ordered Appellant's license suspended for a period of three months and further suspended it for a period of six months on probation for twelve months from the date of service of that order. A separate order also had been issued on 20 March 1978, suspending Appellant's merchant mariner's document for a period of six months on probation for twelve months from the date of service of the order. ¹ In accordance with the former order, Appellant surrendered his license at the Coast Guard Marine Inspection Office, Port Arthur, Texas, on 20 March 1978. Between 1 and 13 April 1978, Appellant served as operator aboard the M/V GULF WATER III. M/V GULF WATER III is an uninspected towing vessel required under 46 U.S.C. 405 to be under the "actual direction and control" of a licensed operator.

BASIS OF APPEAL

It is contended that the suspension of Appellant's license and merchant mariner's document constitutes a "hardship upon the family and the dependents of Appellant."

APPEARANCE: Charles C. Culotta, Jr., Esq., Patterson, Louisiana.

OPINION

I

At the outset, a brief discussion on the proper fashioning of a probationary order is appropriate. In the order under consideration here, the Administrative Law Judge suspended Appellant's merchant mariner's document until 20 December 1978, on probation until 20 December 1978, upon completion of the outright

¹It appears that the administrative Law Judge issued the two separate orders purely as a matter of administrative convenience/ 46 CFR 5.20-170(c) provides that "[a]n order shall be directed against all licenses, certificates, and or documents....." (emphasis added). Administrative convenience is not sufficient reason to violate this regulation by issuing two separate orders upon the conclusion of a single proceeding against the documents of a single respondent.

suspension on 20 September 1978. Other than the impropriety of utilizing specific dates, discussed infra, this order of the Administrative Law Judge was not technically improper. Nevertheless, I question the wisdom of fashioning an order of probation such that the period for which suspension might be ordered diminishes as the period of probation diminishes. normally, an order of suspension on probation provides that, for any violation during the probationary period, the probationary order will be vacated and the resulting suspension will become effective for the entire period of the original suspension. As an example, violation of an order of suspension for six months on probation for twelve months will result in the imposition of a full six month suspension, without regard to whether the violation occurred on the first day of the twelve month probationary period, or the last. Here, the order is fashioned such that not only does the period of probation diminish daily, but the period for which suspension could be ordered (upon violation of probation) diminishes also. Hence, the incentive to avoid commission of an additional violation decreases constantly, becoming virtually nil near the end of the probationary period. It is my belief that the effectiveness of a probationary order will be much enhanced by fashioning the order such that the period of suspension subject to probation remains constant throughout the period of probation.

II

The charge and specification were proved by plea. Furthermore, the record establishes clearly that Appellant, when he accepted the position of operator aboard M/V GULF WATER III, was aware that this constituted a violation of the previously ordered outright suspension of his license. At the hearing Appellant made an unsworn statement in mitigation. He aptly described the hardship caused by his original outright suspension. The Administrative Law Judge apparently did consider this in determining an appropriate order for this violation. I do not deem the order under consideration here unwarranted or unduly harsh. The form of this order is, however, entirely improper. 46 CFR 5.20-170(e) provides that an order is to be stated in terms of "specified period[s]," not specific dates. In fashioning his order as he did, the Administrative Law Judge has caused the period of suspension to expire without my having the opportunity to act upon Appellant's appeal. Because it is unlikely that I would have mitigated this order before it expired, Appellant has not suffered from the error of the Administrative Law Judge. Nevertheless, I do not condone the failure of the Administrative Law Judge to comply strictly with the regulations governing suspension and revocation proceedings. Modification of this order on appeal to comport with 46 CFR 5.20-170(e) would have the effect of increasing the severity

of the order, which is improper. Decision on Appeal No. 570.
Therefore, I shall affirm this order without modification).

ORDER

The order of the Administrative Law Judge, dated at Houston, Texas, on 24 May 1978, is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
VICE COMMANDANT

Signed at Washington, D. C., this 6th day of Sep 1979.

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